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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1556

COLON BROWN and J. P. NICELY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY MEMORANDUM OF PETITIONERS

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REPLY MEMORANDUM OF PETITIONERS

The brief for the United States opposing the Joint Petition for a Writ of Certiorari in this cause is itself an eloquent example of why certiorari should be granted. The Court is here asked to review the convictions of Petitioners which were based on a stale and spotty pastiche of events occurring long before the period open to the prosecution under the applicable statute of limitations—convictions, moreover, which were obtained pursuant to an erroneous rule of law applied retroactively.

A grave constitutional injustice was committed against Petitioners. At issue here is whether two private individuals, contrary to the Constitution and laws of the United States, can be convicted on mere innuendo in a case where even the prosecution admits that no evidence exists of any illegal activity on their part within the statutory period.[1]

PRICE VERIFICATION AND RETROACTIVITY

In the face of a half century of precedent to the contrary, Respondent argues that price verification (in which both Petitioners had only tangential involvement prior to the statutory period and none thereafter) amounts to price fixing under the Sherman Act, regardless of the lawful purpose of such verification, if there is a stabilizing effect on prices. The Court of Appeals for the Third Circuit correctly held that Petitioners and the other appellants were unfairly convicted under an erroneous instruction which precluded the jury from considering lawful purposes for the limited verification which did occur. However, the Court of Appeals incorrectly failed to enter judgment for Petitioners Brown and Nicely and, instead, remanded for a new trial under an even more stringent rule of law on price verification than had been applied previously by any other Court of Appeals. Thus, without the

[1] When the Director of Operations of the Antitrust Division finally approved the filing of the indictment against the individuals, he did so even though he recognized that because of the lapse of time the "evidence" with respect to proposed individual defendants fell short of identifying specific affirmative acts in furtherance of the alleged conspiracy within the five-year period. (DX Q-39).

intervention of this Court, Petitioners, both of whom are now retired and in their late sixties, face another long and arduous fight to prove their innocence in a foreign forum.[2]

Petitioners contend that they cannot be retried under a new rule of law now fashioned by the Court of Appeals out of this Court's holding in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). To do so would perpetuate the trial court's unconstitutionally retroactive application of a new *Container* rule in violation of due process and fundamental fairness. (See *Stanley Marks* v. *United States*, 45 U.S.L.W. 4233 (1977), and Petition for Certiorari, pp. 24-32).

Respondent contends that its reading of *Container* as outlawing price verification regardless of lawful purpose is not inconsistent with prior law, and therefore can be applied retroactively. The basis of Respondent's position is its erroneous argument that the price exchanges held lawful in *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563 (1925), and *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588 (1925), had "no tendency to suppress competition." (Brief in Opposition at 11). On the contrary, this Court specifically recognized in *Cement* that the exchanges "tended to produce uniformity in price." (268 U.S. at 593). *Cement* extended *Maple Flooring*, which also allowed

[2] The "relief" accorded to petitioner J. P. Nicely by the Court of Appeals is particularly poignant. Rather than undergo another tortuous four-month trial, Mr. Nicely moved only for judgment of acquittal, not a new trial, but the Court of Appeals ignored his plea and ordered a new trial for him as well as the other defendants.

price information exchanges, by holding that reciprocal communications between competitors of the prices at which cement was sold under "specific job contracts" were permissible under the Sherman Act even where they related to specifically identified jobs and customers. Such exchanges were approved, despite the trial court's express finding that they tended to produce uniformity in price, because their purpose was to protect against buyer fraud. (268 U.S. at 603-04). Since both *Cement* and *Maple Flooring* involved price exchanges which had a stabilizing effect on prices, to read *Container* as outlawing such exchanges in the face of proof of lawful purpose would create a new rule of law which cannot be applied retroactively. Therefore this Court should grant certiorari to consider the important constitutional implications of applying a rule just fashioned to govern Petitioners' pre-1969 conduct.

PETITIONER COLON BROWN

In addition to objecting to the retroactive application of a new rule of law, Petitioner Colon Brown has sought a writ of certiorari in this case because of the total absence of probative evidence sufficient to support the conviction against him. That lack of evidence was noted by Judge Hunter who wrote the majority opinion of the Court of Appeals. Judge Hunter made a special point of noting expressly that the only possible references in the record which might conceivably link Colon Brown to the alleged price-fixing conspiracy related to a time almost three years prior to the beginning of the statutory period. (Petition Appendix at 27a; 550 F.2d 115, 128 (3rd Cir. 1977)). In its Brief opposing certiorari, Respondent has offered nothing to contravene Judge Hunter's observation. Instead, this Court is offered by Respondent, as have been the two courts below, a series of stale, prestatutory events, none of which show that Colon Brown participated in any way in the conspiracy charged and none of which relate to the statutory period. The central element of Respondent's claim that Colon Brown was involved in the alleged conspiracy was a price increase in December 1965 by National Gypsum following the lead of the largest company in the industry, United States Gypsum. In Respondent's only effort to connect Colon Brown with that allegedly conspiratorial price change, it has relied on a series of meetings in 1965 between Mr. Brown and officials of United States Gypsum. However, Respondent is not able to cite any evidence of illegal conduct by Mr. Brown in the matter. Instead, the prosecution and now Respondent have relied solely on unsupported assertion and innuendo. The actual evidence, which was not impeached or contradicted, was that Colon Brown did indeed meet with certain officials of United States Gypsum during 1965 but that these meetings were held pursuant to encouragement by a United States district court in an effort to settle some patent infringement cases then being litigated by the two companies. (Third Circuit Appendix at 2551a, 3467a).

In spite of the clear and unchallenged evidence of the legitimate purpose and content of those 1965 meet-

ings between Mr. Brown and USG officials, the Government at trial, during the Third Circuit appeal, and now before this Court has continued to press the alleged case against Colon Brown on the spurious ground that because he *could have* engaged in conspiratorial discussions with USG officials he must be deemed actually to have done so. (Brief in Opposition at 4).

Moreover, by Respondent's own account, the 1965 price increase did not last into the statutory period because of a nationwide price *decrease* by National in May 1967, a decrease which was ordered by Colon Brown himself. (Third Circuit Appendix at 3568a). Clearly, the remote events of 1965, even if viewed through the distorted perspective advanced by Respondent, cannot support Colon Brown's conviction for a conspiracy allegedly continuing into the statutory period.

Similarly, the change in credit terms of March 1966, on which National again followed the lead of other gypsum producers, presents no probative evidence of guilt as to Colon Brown. The record shows only that when one gypsum producer announced the adoption of new credit terms, other companies, including National, announced on different dates the adoption of similar terms.

Colon Brown's interest in the general subject of credit terms was superficial at best and was generated by an internal company memorandum written on August 7, 1965, by a subordinate employee concerned with production schedules in the plants. The memorandum was written long before the March 1966 credit change,

and pointed out that National's credit policies encouraged customers to defer orders until late in the month so as to obtain extended payment terms, thereby creating problems with plant production schedules. (Third Circuit Appendix at 892 ex).

As a result of that memorandum in August 1965, Colon Brown, who had recently become Chairman of the Board and Chief Executive Officer of National, ordered "an objective analysis" of the problem and stated, "If this is costing profits, then let's act." (Third Circuit Appendix at 894 ex). Over the following several months a number of alternatives were considered. USG's credit change announced in January 1966 to become effective March 1 bore little resemblance to the various credit plans which National had been considering. National, however, in the exercise of its own business judgment and in order to remain competitive, followed USG's lead by announcing its credit change on February 1.

No evidence exists to show that Colon Brown discussed National's change in credit terms with representatives of any other gypsum producers. There is absolutely no evidence that he had any advance knowledge of USG's plans. Respondent relies primarily on an ambiguous entry in Colon Brown's desk calendar for the assertion that he met with a Mr. Fredericks of Georgia Pacific, during which meeting he must have discussed a credit change. Mr. Fredericks, under direct examination by the prosecutor, remembered no such meeting (Tr. 5169) and testified that he was only generally aware of credit problems as a whole. (Tr. 5194).

Just as with the 1965 price change, the 1966 credit change did not last long at National, and was substantially modified prior to the statutory period.

Finally, as Respondent's Brief in Opposition tacitly admits, Colon Brown was truly removed from the issue of price verification. (Brief in Opposition at 7). There is nothing in the record to show that Colon Brown had any knowledge of what other gypsum producers did with respect to verification. The only testimony cited by Respondent in an attempt to link Mr. Brown with verification was that of Earl Kroth, who testified that Mr. Brown knew verification calls had been made but that this occurred "somewhere in about late '66 early '67." (Third Circuit Appendix at 1709a). Mr. Kroth himself testified later that verification calls ended at National by the time the statutory period was beginning. (Third Circuit Appendix at 1717a). There is no evidence in the record that Colon Brown had any knowledge whatsoever of a single verification call by anyone at National at any time within the statutory period.

Colon Brown does not come before this Court arguing "routine assertion of factual error" as Respondent contends. (Brief in Opposition at 9). Instead, Mr. Brown seeks to call this Court's attention to "a record lacking any relevent evidence as to a crucial element of the offense charged. . . ." (*Vachon* v. *New Hampshire,* 414 U.S. 478, 480 (1974)). Respondent's failure in its Brief in Opposition to cite substantive evidence of participation by Colon Brown in the conspiracy charged, both before and during the statutory period, requires that his Petition for a Writ of Certiorari be granted.

PETITIONER J. P. NICELY

Just as with the alleged case against Colon Brown, it is obvious from the Respondent's Brief opposing certiorari that the Government has nothing to support the conviction of Petitioner J. P. Nicely other than three stale, misleading, and unrelated episodes all occurring prior to the statutory period. In its Brief, Respondent exposes the pathetic weakness of its case by referring this Court almost immediately to an incident which occurred in March 1962—fully six years prior to the commencement of the statutory period. That was a visit which Mr. Nicely made in a sales capacity to Groves Lumber Company in Dallas, Texas. Respondent refers to a conversation which Mr. Nicely had at that time with a Mr. John Tinsley, Manager of Groves Lumber Company. The content and purpose of that conversation are clearly set forth in the record of this case and offer no basis upon which a charge of conspiracy or predatory conduct by National Gypsum or Mr. Nicely can be sustained. The visit was described in detail in the Joint Petition for Certiorari on page 15. Most importantly, however, Respondent has not been able to show any link whatsoever between this remote and legally innocuous event and the so-called nationwide price-fixing conspiracy alleged in the indictment as having continued into the statutory period.

The second of the three feeble attempts to link Mr. Nicely with the claimed conspiracy involves the same 1965 price increase and 1966 credit change with which Respondent attempted to prop up its non-existent case against Colon Brown. As with Mr. Brown, Mr. Nicely is shown by the record to have been only an incidental participant in the activities related to those events. (*See* Joint Petition for Certiorari at 10, 11). There is

no evidence to show that Mr. Nicely participated in a conspiracy involving either prices or credit at any time, much less in 1965 and 1966. Indeed the evidence shows that his involvement in the 1965 price increase was limited to the preparation of National's own price announcement on the direct orders of his company's president, Mr. Manske. The prosecution never offered any evidence that Mr. Nicely engaged in price-fixing discussions in 1965 or at any other time.

Insofar as the 1966 change in credit terms is concerned, Mr. Nicely's role was shown by the evidence to have been limited to expressing his written opinion from the standpoint of his Sales Department on whether the proposed credit policy would be feasible. (Third Circuit Appendix at 1055 ex, 1056 ex). There is no evidence in the record that Mr. Nicely ever participated in any discussions at National on the credit change, but more importantly there is no evidence that he was in contact with any competitors on the subject.

Regardless of the foregoing, however, the record clearly shows that neither the 1965 price increase nor the 1966 credit change continued at National into the statutory period.

Finally, Respondent completely disregards the record in a third futile attempt to link Petitioner Nicely to the alleged conspiracy through the issue of price verification. That is a practice which Respondent characterizes in its Brief as an "exchange of price and credit term information." (Brief in Opposition at 7). Whatever might be the legal implications of price verification (which has until now been upheld by all United States courts of appeal reviewing the issue when done

for Robinson-Patman Act purposes), there is absolutely nothing in the record to connect Mr. Nicely with price verification in the statutory period.

Mr. Nicely testified without contradiction that he had no direct participation in verification calls, that he had never made a verification call to a competitor or received one from a competitor, and that he had never talked to a competitor about verification of a price. He testified further that he never gave instructions to anyone else with regard to verification of prices with competitors and never asked any employee of National Gypsum to make a verification call. (Third Circuit Appendix at 127a-128a, 134a, 140a).

In its Brief opposing certiorari, Respondent refers to this and other related testimony as "self-serving protestations of innocence." (Brief in Opposition at 9). What Respondent ignores is that Mr. Nicely's testimony is the only evidence in the record regarding the subject. What Respondent also conveniently ignores is the undisputed evidence of record that the sole initiative taken by Mr. Nicely relating to verification was his suggestion to Mr. Kenneth Atwell of the company's Sales Department that the practice of verification be discontinued when, in January 1969, he read in the newspaper of this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333 (1969). (Third Circuit Appendix at 132a-133a).

Throughout this proceeding Mr. Nicely has consistently maintained that he did not participate in any conspiracy in violation of the antitrust laws. Beyond that, however, the failure by the prosecution and Respondent to offer any evidence of his involvement in a conspiracy either before or during the statutory period raises fundamental questions of constitutional scope.

As in *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960), the so-called case against Mr. Nicely is not one involving mere sufficiency of the evidence, as Respondent would have this Court believe, but instead is one involving "whether this conviction rests upon any evidence at all." (362 U.S. at 199).

Respondent raises as another objection to granting certiorari here the argument that no final judgment has been entered against Mr. Nicely because the appellate court reversed and remanded for new trial. (Brief in Opposition at 9). This is a novel argument on the part of Respondent since it, too, has petitioned this Court for certiorari in this matter under the caption *United States* v. *United States Gypsum Company, et al.*, No. 76-1560.

The opportunistic inconsistency of Respondent's argument here applies with equal force to both Petitioners Brown and Nicely. However, there is an added irony with regard to Mr. Nicely since, as noted at the outset of this Memorandum, his appeal to the Third Circuit as well as his petition for certiorari have made it abundantly clear that he has not sought the remedy of a new trial but instead has consistently urged review of his conviction solely on the grounds of lack of evidence.

CONCLUSION

For the reasons stated, the Joint Petition for Writ of Certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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